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MAYA AHMAD FUAD v. PP

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[CRIMINAL APPEAL NO: WA-41(ORS)-4-11-2022]
6 FEBRUARY 2024

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Abstract – *(i) The definition of 'decision' in s. 3 of the Courts of Judicature Act 1964 is clear and unambiguous and courts must give effect to it. When the rights of a claimant has not been finally disposed of, the relevant matter should be dealt with by way of revision and not by way of an appeal. Accordingly, there is no jurisdiction to hear a matter where the decision does not constitute a final resolution of the whole controversy of a case that occurs before the trial court's final ruling on the entire case; (ii) An application to strike out a criminal proceeding on the ground that the Magistrate has ceased jurisdiction in the trial is unknown in criminal law. Once a prosecution is instituted and the trial begins, a criminal proceeding can never be struck out or nullified on the ground of change of Magistrate during a hearing of a criminal trial.*

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CRIMINAL PROCEDURE: *Trial – Proceedings – Application to nullify entire criminal proceeding – Whether first Magistrate ceased jurisdiction upon his transfer and could no longer hear case – Whether first Magistrate continuing to hear case after transfer tantamount to irregularity in law – Whether proceedings null and void – Whether there was judgment, sentence or order pronounced by second Magistrate – Whether matter appealable – Criminal Procedure Code, s. 307 – Courts of Judicature Act 1964, s. 3*

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STATUTORY INTERPRETATION: *'decision' – Courts of Judicature Act 1964, s. 3 – Criminal Procedure Code, s. 307 – Whether defined as judgment, sentence or order – Whether includes any ruling made in course of trial or hearing of any cause or matter which does not finally dispose of rights of parties*

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This was an appeal against the decision of the Magistrate dismissing the appellant's application to nullify the entire criminal proceeding against her and to be discharged and acquitted. The appellant was charged for an offence of making false statement on oath under s. 181 of the Penal Code before the Magistrates' Court. The appellant pleaded not guilty and claimed trial. The appellant was represented by the law firm The Law Office of Parmjit Singh throughout the trial at the prosecution stage. The trial commenced before the Magistrate Tuan Saravanan Meyappan ('M1'). During cross-examination of the prosecution's witness, PW7, the defence applied for PW7 to be impeached and that cross-examination of the same to be continued only after a ruling was made by M1 relating to the impeachment application/ proceeding. Thereafter, M1 was transferred to the Ministry of Entrepreneur

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and Cooperatives Development ('MECD'). Counsel for the complainant then wrote to the Chief Registrar seeking for M1 to continue hearing the case and the letter was copied to the appellant's solicitor and the prosecution. Subsequently, M1 returned to continue hearing the impeachment application and further heard the application for the statement of PW7 under s. 112 of the Criminal Procedure Code ('CPC'). Both applications were rejected by M1 who instructed for cross-examination of PW5 and PW7 to be continued. Examinations of both PW5 and PW7 were completed and the case for the prosecution was closed. The appellant was then ordered to enter her defence. Messrs Jagjit Singh & Co wrote to the court informing that they had taken over the conduct of the appellant's case and asked for confirmation from the Registrar of the Subordinate Court of Malaya whether M1 was still having the power as a Magistrate and was still gazetted as the same. They were informed that the trial would proceed before a new Magistrate ('M2') who would be taking over M1. Before M2, the appellant applied for the trial to be postponed on the ground that an application would be filed for the appellant to be acquitted and discharged on the ground, *inter alia*, that M1 had ceased jurisdiction when he continued to hear the case after his transfer as Federal Counsel at the MECD. M2 set aside the application and hence, this appeal. The appellant contended that (i) M1 had ceased jurisdiction as a Magistrate upon his transfer to the MECD and he could no longer hear the appellant's case as he could not be performing two different functions simultaneously; (ii) the prosecution failed to show proof that M1 continued to hear the part-heard trial on the instruction of the Chief Judge of Malaya; (iii) M1, having continued to hear the part-heard case after his transfer, had erred and/or tantamount to an irregularity in law more so when he did not disclose openly about his transfer during the continued proceedings and before the case was taken over by M2 under s. 261 of the CPC; (iv) as there were incurable irregularities in the proceeding, the ruling made directing the appellant to enter her defence and the entire proceeding at the prosecution stage were null and void as well as a mistrial and as such the appellant ought to be acquitted and discharged from the charge preferred against her; and (v) that the order of discharge and acquittal was valid in law as M1 had ceased jurisdiction as a Magistrate which was analogous to a Deputy Public Prosecutor ('DPP') who had not been accorded with a fiat to prosecute under the law resulting to a criminal proceeding to be null and void and a mistrial. The respondent raised a preliminary objection on the ground that the matter herein was not appealable as there was no judgment, sentence or order pronounced by M2 within the meaning of s. 307(i) of the CPC.

Held (dismissing appeal):

(1) The words judgment, sentence or order appearing in s. 307 of the CPC must be read together with s. 3 of the Courts of Judicature Act 1964 ('CJA'). The word used is 'decision'. It means judgment, sentence or order, but does not include any ruling made in the course of the trial or

A hearing of any cause or matter which does not finally dispose of the rights of the parties. The decision by M2 in dismissing the appellant's application herein was not appealable as it did not come within the ambit of the statutory provision, specifically s. 307 of the CPC. Since the defence stage had yet to be exhausted, the decision made by M2 was
B a procedural ruling and not a judgment, decision or order within the meaning of s. 307 of the CPC and s. 3 of the CJA. The decision of M2 was a ruling that did not have the effect of finally disposing of the appellant's rights. (paras 26 & 29)

(2) The rights of the appellant had not been finally disposed of because at
C the defence stage, the appellant had the right to re-call any of the prosecution witnesses and raise issues including the legality of the proceedings. The present matter should have been dealt with by way of revision and not by way of an appeal as the rights of the appellant had not been disposed of. Hence, on this ground alone, this instant appeal
D could not be entertained. In fact, as the definition of 'decision' in s. 3 of the CJA is clear and unambiguous, this court must give effect to it. This court had no powers beyond those conferred by Parliament. Accordingly, there was no jurisdiction to hear this matter where the decision of M2 did not constitute a final resolution of the whole
E controversy of a case that occurred before the trial court's final ruling on the entire case. (paras 31 & 32)

(3) The application made in the Magistrates' Court appealed against before this court to strike out a criminal proceeding on the ground that the Magistrate had ceased jurisdiction in the trial was unknown in criminal
F law. Once a prosecution is instituted and the trial begins, a criminal proceeding can never be struck out or nullified on the ground of a change of Magistrate during hearing of a criminal trial or that the Magistrate had ceased jurisdiction in the trial. Before the transfer of M1, he was still a Magistrate having jurisdiction to hear the trial. The fact that M1 still
G continued to hear two more witnesses for the prosecution at the time he was already a Federal Counsel and made a ruling to call for the appellant to enter her defence could not be said to be void *ab initio*. So it could not be comprehended why the entire trial was contended to be null and void solely on the ground that M1 was said to have ceased jurisdiction due to his transfer while the trial was still ongoing. Hence, here lay the
H wisdom of decided cases where the judges had instead ordered for a *de novo* or continuation of the trial by the new Magistrate pursuant to s. 261 of the CPC and not striking out or nullifying the entire trial. (paras 33-34)

I **(4)** There was nothing before this court or the Magistrate's Court that showed how the appellant could be said to be prejudiced or had been prejudiced in the sense that there was a likelihood of bias on the part of M1 having been transferred as Federal Counsel at the MECD who

continued to hear his part-heard case with just two more witnesses where their examination-in-chief had completed before his transfer. It was also apparent that the present application only arose when the appellant had appointed a new set of solicitors to represent her. One of the principles of law is that any objection must be raised at the time when the situation arose otherwise it can be inferred that it is an afterthought. The appellant knew of the transfer of M1 because in a letter of the complainant's solicitor, there was a request for M1 to continue with the trial which was copied to the solicitor representing the appellant at that material time and no objection was taken up by the appellant. Instead, the proceedings continued before M1 until the close of the prosecution's case. (paras 46 & 50)

(5) There was nothing in law or rules that states a Magistrate must declare his transfer to the parties in litigation before him. By virtue of s. 114(e) of the Evidence Act 1950, upon returning to continue with his part-heard case, it could be presumed that the judicial and official acts of M1 had been regularly performed including obtaining the mandate/directive from the Chief Registrar's office for him to continue with his part-heard case until the close of the prosecution's case. There was also nothing in law to state that a letter or email informing of the new Magistrate taking over the trial at the defence stage tantamount to an affirmation that the trial before M1 when he was already transferred as FC to be a nullity or that M1 had ceased jurisdiction. The letter/email merely stated that the new Magistrate in the form of M2 would take over the trial at the defence stage. (paras 51 & 52)

Case(s) referred to:

Abdul Hamid Udin v. PP [2000] CLJU 198; [2000] 1 LNS 198 HC ***(refd)***
Datin Seri Rosmah Mansor v. PP & Another Appeal [2022] 4 CLJ 523 CA ***(dist)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2011] 2 CLJ 845 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 217 HC ***(dist)***
Gobinath Sinnaya v. PP & Other Appeals [2023] 1 CLJ 174 CA ***(refd)***
Koperasi Jimat Cermat Dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241 FC ***(refd)***
Lim Guan Eng v. Ruslan Kassim & Another Appeal [2021] 4 CLJ 155 FC ***(dist)***
Maleb Su v. PP & Another Case [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232 HC ***(refd)***
Md Zaki Fazil Maon lwn. PP [2010] CLJU 1883; [2010] 1 LNS 1883 HC ***(refd)***
Mohd Amin Abdullah v. PP [1995] 1 CLJ 33 HC ***(refd)***
Mohd Shukur Hassan & Anor v. PP [2004] 1 LNS 108 HC ***(refd)***
Mukhtar Abdul Rahman v. PP [2008] 1 LNS 588 HC ***(refd)***
Oh Keng Seng v. PP [1975] CLJU 114; [1975] 1 LNS 114 HC ***(refd)***
PP lwn. Anthony Rayapan & Satu Lagi [2010] 10 CLJ 428 HC ***(refd)***
PP v. Goh Chooi Guan [1976] 2 MLJ 169 ***(refd)***
PP v. Hoo Chang Chwen [1962] CLJU 123; [1962] 1 LNS 123 HC ***(refd)***
PP v. Kulasingam [1974] CLJU 118; [1974] 1 LNS 118 HC ***(refd)***
PP v. Mohd Jon [1992] CLJU 48; [1992] 1 LNS 48 HC ***(refd)***

A *PP v. Syarikat Tekala Sdn Bhd [2007] 6 CLJ 43 CA* ***(dist)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(dist)***
Ruslee Baharum v. PP [2009] CLJU 1520; [2009] 1 LNS 1520 HC ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
Teay Wah Cheong v. PP [1963] CLJU 142; [1963] 1 LNS 142 HC ***(refd)***
Tennakoon D Harold v. PP [1997] 1 CLJ Supp 392 HC ***(refd)***
B *Yap You Jee v. PP & Other Appeals [2015] 7 CLJ 897 CA* ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, ss. 112, 261, 307(i), 323
Evidence Act 1950, s. 114(e)
C Penal Code, s. 181
Subordinate Courts Act 1948, s. 78(2)

For the prosecution - Mohamad Shahrizzat Amadan & Muhammad Aiman Azahan; DPPs
For the appellant - Jagjit Singh, Akberdin Abdul Kader & Meor Hafiz Salehan; M/s Akberdin & Co & M/s Jagjit Singh & Co

D *Reported by Suhainah Wahiduddin*

JUDGMENT

Noorin Badaruddin J:

E **[1]** This is an appeal against the decision of the learned Magistrate dismissing the appellant's application to nullify the entire criminal proceeding against her and to be discharged and acquitted.

Background Facts

F **[2]** On 30 January 2019, the appellant was charged for an offence of making false statement on oath under s. 181 of the Penal Code before the Magistrates' Court (Case No: WA-83-715-01-2019). The appellant pleaded not guilty and claimed trial. The appellant was represented by the law firm The Law Office of Parmjit Singh throughout the trial at the prosecution stage.

G **[3]** The trial began on 18 November 2019 before the learned Magistrate, Tuan Saravanan a/l Meyappan (hereinafter referred to as "M1").

[4] On 30 November 2020, during cross-examination of prosecution's witness PW7, the defence applied for PW7 to be impeached and that cross-examination of the same to be continued only after a ruling is made by
H the learned M1 relating to the impeachment application/proceeding. Learned counsel for the appellant further seek to reserve his right to cross-examine another prosecution's witness, PW5 until the same ruling is made. The learned M1 then directed learned counsel for the appellant to file a formal application.

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[5] Thereafter, the learned M1 was transferred to the Ministry of Entrepreneur and Cooperatives Development ("MECD") effective 4 January 2021. At this point of time, six prosecution witnesses had testified whilst cross-examination of two prosecution witnesses, PW7 and PW5, were still pending. In addition, 35 exhibits have been produced before the court.

[6] *Vide* letter dated 14 January 2021, counsel for the complainant then wrote to the Chief Registrar seeking for the learned M1 to continue hearing the case and the letter was copied to the appellant's solicitor and the prosecution.

[7] Learned M1 returned to continue hearing the impeachment application on 12 April 2021. On 22 September 2021, learned M1 further heard the application for the statement of PW7 under s. 112 of the Criminal Procedure Code ("CPC"). Both applications were rejected by the learned M1 and he had instructed for cross-examination of PW5 and PW7 to be continued. On 10 November 2021, examinations of both PW5 and PW7 were completed and the case for the prosecution was closed.

[8] On 21 January 2022, the appellant was ordered to enter her defence.

[9] On 18 April 2022, Messrs Jagjit Singh & Co wrote to the court informing that they have taken over the conduct of the appellant's case from The Law Office of Parmjit Singh.

[10] On 9 June 2022, Messrs Jagjit Singh & Co wrote to the Registrar of the Subordinate Courts Malaya, Tuan Azhanis Teh asking for confirmation whether the learned M1 is still having the power as a Magistrate and is still gazetted as the same.

[11] On 13 June 2022, Tuan Azhanis Teh replied and informed Messrs Jagjit Singh that the trial will proceed before a new Magistrate (hereinafter referred to as "M2") who will be taking over the learned M1.

[12] Before the learned M2, learned counsel for the appellant then applied for the trial to be postponed on the ground that an application would be filed for the appellant to be acquitted and discharged on the ground *inter alia* that the learned M1 has ceased jurisdiction when he continued to hear the case after his transfer as Federal Counsel at the MECD. Formal application was filed on 12 July 2022.

[13] On 28 December 2022, the learned M2 set aside the application and hence, the appeal was filed herein.

Findings Of The Learned M2

[14] The pertinent parts of the learned M2's findings are reproduced:

28. Di dalam kes ini, Tuan Majistret terdahulu telah ditukarkan ke KUSKOP sebagai Peguam Persekutuan. Mahkamah ini telah menggunakan kes-kes di atas sebagai panduan dan dengan mengaplikasikan kes tersebut di dalam situasi kes ini, Mahkamah berpendapat bahawa tiada halangan untuk Tuan Majistret terdahulu sambung mendengar kes rayuan Perayu selepas bertukar sebagai Peguam Persekutuan kerana beliau masih belum cease to exercise jurisdiction dan tindakan yang diambil masih di dalam kapasitinya sebagai seorang majistret. Seperti yang dikatakan di dalam kes *Public Prosecutor v. Kulasingam* (*supra*) "… all these officers belong to the same parent service …" Oleh itu, Mahkamah ini berpandangan tindakan Tuan Saravanan tidak terjumlah atas suatu tindakan yang tidak teratur atau salah di sisi undang-undang.

29. ...

30. ...

31. Merujuk perenggan 13 Alasan ini di atas, Tuan Azhanis Teh bin Azman Teh, Pendaftar Mahkamah Rendah Malaya telah memaklumkan bahawa kes sambung bicara Perayu akan diteruskan dan didengar di hadapan Majistret pengganti. Dengan menggunakan kes *Yap You Jee v. Public Prosecutor and other appeals* (*supra*) sebagai panduan, Mahkamah ini berpandangan tidak wujud kegagalan pematuhan pada seksyen 261 KTJ dan tiada keperluan untuk satu perintah perbicaraan semula diberikan memandangkan arahan pendengaran kes Perayu yang diberikan adalah bersifat pentadbiran dan tidak memprejudis Perayu.

32. Justeru, selepas mempertimbangkan segala factor yang dinyatakan termasuklah hujahan dari kedua-dua belah pihak, serta mengaplikasikan dan menggunakan kes-kes yang telah diputuskan sebagai panduan, Mahkamah membuat dapatan bahawa Tuan Saravanan masih mempunyai bidang kuasa sebagai Majistret meskipun telah bertukar sebagai Peguam Persekutuan bermula 4 Januari 2021 dan tindakannya untuk terus mendengar kes jenayah Perayu adalah tidak salah di sisi undang-undang, tidak terjumlah pada satu perbicaraan silap (mistrial) dan prosiding perbicaraan penuh yang telah berlangsung adalah sah. Mahkamah ini memutuskan bahawa permohonan yang diusulkan oleh pihak Perayu adalah tidak bermerit dan permohonan tersebut ditolak.

33. Setelah meneliti segala pertimbangan termasuk kepentingan awam serta kepentingan peribadi Perayu, mahkamah dengan ini memerintahkan Perayu dipanggil untuk membela diri.

Summary Of The Appellant's Contentions

[15] Summarily, it is the appellant's contention that:

(i) the learned M1 has ceased jurisdiction as a Magistrate effective 4 January 2021 upon his transfer to the MECD and he can no longer hear the appellant's case as he could not be performing two different functions simultaneously;

(ii) the prosecution has failed to show proof that the learned M1 continued to hear the part-heard trial on the instruction of the Rt Hon Chief Judge of Malaya;

(iii) the learned M1 having continued to hear the part-heard case after his transfer has erred and/or tantamount to an irregularity in law more so when he did not disclose openly about his transfer during the continued proceedings and before the case was taken over by the learned M2 under s. 261 of the CPC;

(iv) as there is an incurable irregularities in the proceeding, the ruling made directing the appellant to enter her defence and the entire proceeding at the prosecution stage are null and void as well as a mistrial and as such the appellant ought to be acquitted and discharged from the charge preferred against her; and

(v) that the order of discharge and acquittal is valid in law as the learned M1 has ceased jurisdiction as a Magistrate effective from 4 January 2021 which is analogous to a Deputy Public Prosecutor ("DPP") who has not been accorded with a fiat to prosecute under the law resulting to a criminal proceeding to be null and void and a mistrial.

Evaluation And Findings

[16] The application before the learned M2 falls under the parameters of s. 261 of the CPC involving a change of Magistrate during the hearing of a criminal trial. The application was for an order that the criminal proceeding (*ie*, the prosecution stage of the trial) is null and void on the ground that the learned M1 who heard the case at the prosecution stage of the trial has ceased jurisdiction in the trial since he has been transferred to the Attorney General's Chambers ("AGC") and posted as Federal Counsel at the MECD.

[17] Section 261 of the CPC provides:

> 261 Change of Magistrate during hearing
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> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may resummon the witnesses and recommence the inquiry or trial;
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> Provided as follows:
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> (a) In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;

A (b) The High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

B **[18]** It must be observed that the matter before this court is by way of an appeal against the ruling made by the learned M2. It is observed further that learned counsel for the appellant had agreed that in hearing the appellant's application, the learned M2 would be making a ruling and not a decision. This can be seen from the notes of proceedings in vol. 2 p. 3, para. 1 where C learned counsel stated:

> Setelah ruling untuk permohonan ini diterima, barulah kes perbicaraan boleh diteruskan. Permohonan ini akan ada ruling dan bukan lagi satu keputusan. Oleh itu pohon penangguhan diberikan.

[19] The prosecution as the respondent herein raised a preliminary D objection on the ground that the matter herein is not appealable as there is no judgment, sentence or order pronounced by the learned M2 within the meaning of s. 307(i) of the CPC. In other words, it is the prosecution's submission that in dismissing the application by the appellant herein, the ruling made by the learned M2 does not have the element of finality and E therefore cannot be appealed against.

[20] Section 307(i) of the CPC provides:

> Procedure for appeal
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> 307. (1) Except in any case to which section 304 applies and subject to F sections 305 and 306 any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within fourteen days from the G time of the judgment, sentence or order being passed or made, with the clerk of the Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

[21] A decision is final once it is taken to its conclusion, which ultimately H results in:

(i) a conviction of the accused;

(ii) an acquittal of the accused;

(iii) a sentence which entails a form of a punishment such as imprisonment I for life or fine; and

(iv) an order which finally dispose of the rights of parties.

[22] The above is what judgment, sentence or order pronounced means in criminal matters. A

[23] It is apposite to note that no appeal from the subordinate court lies to a superior court unless there is a statutory provision allowing such a right to appeal. In other words, there is no general right of appeal.

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[24] Appellate jurisdiction is solely a creation of statute. It only extends as far as the words of the statute require. To that extent the decision made by a court of original jurisdiction is final and appealable only if it is provided for by statute (see *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537; [1999] 1 MLJ 321). The court cannot invent a right of appeal where none is given and the courts will not usurp an appellate jurisdiction where none is created (per Tun Arifin Zakaria CJ (as he then was) in *Koperasi Jimat Cermat Dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241; [2011] 2 MLJ 433). C

[25] In *Gobinath Sinnaya v. PP & Other Appeals* [2023] 1 CLJ 174, the Court of Appeal in analysing and deciding on the preliminary objection raised by the Public Prosecutor therein on the ground that the decision of the High Court Judge on the issue of bail is not appealable stated the followings: D

> [7] To begin with, as the Court of Appeal is a creation of statute, its jurisdiction derives from the statutory provisions, including the right to appeal to the Court of Appeal. *The appeal is incompetent unless the statute provides legislative authority that gives the right to appeal.* This principle of law has been explained in a plethora of cases including the case of *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537 where NH Chan JCA said this: E
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> … As said by Lord Goddard CJ in *R v. West Kent Quarter Sessions Appeal Committee* [1951] 2 All ER 728 at p 730: F
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> *It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute.* See also *Attorney-General v. Sillem* [1864] 10 HLC 704 where the House of Lords held that the creation of a right of appeal is an act which requires legislative authority: see by Lord Westbury LC at 719. G
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> *There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision that gives a right to appeal.* The creation of a right of appeal is an act that requires legislative authority. The right to appeal from one court to another must be conferred by some statute, otherwise, the decision of every court of law is final. (emphasis added) H

[26] The words judgment, sentence or order appearing in s. 307 of the CPC must be read together with s. 3 of the Courts of Judicature Act 1964 ("CJA") The word used is 'decision'. It means judgment, sentence or order, but does not include any ruling made in the course of the trial or hearing of any cause I

or matter which does not finally dispose of the rights of the parties. Again in *Gobinath Sinnaya v. PP & Other Appeals* (*supra*), the Court of Appeal further elaborated as follows:

> [9] The word 'decision' has been defined under s 3 of the CJA as follows:
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> 'decision' means judgment, sentence, or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.
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> [10] The definition of 'decision' under s 3 is plain and unambiguous that it excludes any ruling which does not finally dispose of the rights of parties. This as opposed to the earlier definition of 'decision' before the amendment by amendment Act A1031 of 1998 that came into force on 31 July 1998 which is as follows:
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> 'decision' means any judgment, sentence, or order.
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> [11] *Hence, after the said amendment, a decision that is appealable under s 50 of CJA is only those that have finally disposed of the rights of parties, not any interlocutory judgment or order where the final rights of parties are yet to be disposed of although the judgment, ruling or order is conclusive or final to the subordinate matter.* This has been succinctly explained in the *Dato' Seri Anwar Ibrahim*'s case at pp 320-321 (MLJ); p 549 (CLJ) in the following manner:
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> This new definition of 'decision', as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by *Halsbury's Laws of England* (4th Edn) Vol 26, para 506, at p 240, which reads:
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> 506. Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.
>
> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.
>
> *Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Courts of Judicature Act, and therefore is not appealable.* It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals.
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> (emphasis added)

[27] In the case of *Saad Abas & Anor v. PP* [1998] 4 CLJ 575; [1999] 1 MLJ 129, the court has to ascertain whether the 'decision' of the High Court in ordering the appellants to enter their defence was a ruling that had effect of finally disposing of their rights. The court then held:

(1) *If at the end of the prosecution case, the court finds that there is a prima facie case against the accused, the court has no other option but to call upon the accused to enter on his defence.* The accused will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. There is no room for the accused to avoid the issue of presenting his case; he must comply …

(2) *The decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights. At the stage of making the order, it had no finality in its intent. This would only happen after a decision had been made at the close of the defence. Only then will there be a decision to 'affect the event of the appeal'*, *Au King Chor & Ors v. PP* [1985] 1 MLJ 216 distinguished. (emphasis added)

[28] Here is where the appellant is seeking for the entire proceeding at the prosecution stage to be nullified on the ground that the learned M1 who had ordered the appellant to enter her defence has ceased jurisdiction.

[29] This court agrees with the prosecution/respondent that the decision by the learned M2 in dismissing the appellant's application herein is not appealable as it does not come within the ambit of the statutory provision specifically s. 307 of the CPC. Since the defence stage has yet to be exhausted, the decision made by the learned M2 is a procedural ruling and not a judgment, decision or order within the meaning of s. 307 of the CPC and s. 3 of the CJA. In other words, the decision of the learned M2 was a ruling that did not have the effect of finally disposing of the appellant's rights.

[30] In *Maleb Su v. PP & Another Case* [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232; [1984] 1 MLJ 311, for instance, the question of right to appeal under s. 307(i) of the CPC was elucidated by Hashim Yeop A Sani FJ (as he then was). In that case, the appeals were against the dismissal of the application to disqualify the President of the Sessions Court and Magistrate. The application was that the President and Magistrate should disqualify himself from proceeding with the case on the grounds that he belonged to a service in which the Attorney General is said to be the head of the service. Since the Attorney General is also the Public Prosecutor and has supervision and control of these judicial officers it was alleged that there was a likelihood of bias. Hashim Yeop A Sani FJ ruled that the matter did not finally dispose of the rights of the accused person and the order was not a proper matter for appeal under s. 307(i) of the CPC. However, notwithstanding the absence of the right to appeal, the learned judge opined that it would be desirable to exercise the revisionary powers to dispose of the issue in those appeals on the merit since the questions involved have created some degree of uncertainty among judicial officers.

[31] The question herein is whether the decision by the learned M2 has finally disposed of the rights of the appellant herein. The answer is in the negative as the rights of the appellant has not been finally disposed of because

at the defence stage, the appellant has the right to re-call any of the prosecution witnesses and raise issues including the legality of the proceedings.

[32] It is of the considered view and based on the authorities, the present matter should have been dealt with by way of revision and not by way of an appeal as the rights of the appellant has not been disposed of. Hence, on this ground alone, the instant appeal cannot be entertained. In fact, as the definition of 'decision' in s. 3 of the CJA is clear and unambiguous, this court must give effect to it. This court has no powers beyond those conferred by Parliament. Accordingly, there is no jurisdiction to hear this matter where the decision of the learned M2 does not constitute a final resolution of the whole controversy of a case that occurs before the trial court's final ruling on the entire case (see *Dato' Seri Anwar Ibrahim v. PP* [2011] 2 CLJ 845). To borrow the words of Rose CJ in *PP v. Hoo Chang Chwen* [1962] CLJU 123; [1962] 1 LNS 123; [1962] MLJ 284 where His Lordship said:

> *I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.*
>
> (emphasis added)

[33] In any event, this court finds that the application made in the Magistrates' Court appealed against before this court to strike out a criminal proceeding on the ground that the Magistrate has ceased jurisdiction in the trial is unknown in criminal law. Once a prosecution is instituted and the trial begins, a criminal proceeding can never be struck out or nullified on the ground of change of Magistrate during hearing of a criminal trial or that the Magistrate has ceased jurisdiction in the trial.

[34] In this case, before the transfer of the learned M1, it is obvious that he was still a Magistrate having jurisdiction to hear the trial. In other words, the fact that the learned M1 continued to hear two more witnesses for the prosecution at the time he was already a Federal Counsel and made a ruling to call for the appellant to enter her defence cannot be said to be void *ab initio*. So, it cannot be comprehended why the entire trial is contended to be null and void solely on the ground that the learned M1 is said to have ceased jurisdiction due to his transfer while the trial was still ongoing. Hence, here lies the wisdom of decided cases where the judges had instead ordered for a *de novo* or continuation of the trial by the new Magistrate pursuant to s. 261 of the CPC and not striking out or nullified the entire trial. In fact, the authorities cited by both parties relating to s. 261 of the CPC did not end up with a striking off of the proceedings or nullification of the same. What the courts have ordered in those cases are either the trial to be tried *de novo* or continuation of the trial by the new Magistrate or trial judge based on the circumstances of the case.

[35] It must also be borne in mind that in those cases, the matters before the High Courts were made by way of an application or revision or appeal at the close of the case where the issue on s. 261 of the CPC was raised in the proper appeal (see: *Mohd Amin Abdullah v. PP* [1995] 1 CLJ 33; *Oh Keng Seng v. PP* [1975] CLJU 114; [1975] 1 LNS 114; [1976] 1 MLJ 143; *PP v. Kulasingam* [1974] CLJU 118; [1974] 1 LNS 118; [1974] 2 MLJ 26; *Abdul Hamid Udin v. PP* [2000] CLJU 198; [2000] 1 LNS 198; *Mukhtar Abdul Rahman v. PP* [2008] CLJU 588; [2008] 1 LNS 588; *Mohd Shukur Hassan & Anor v. PP* [2004] CLJU 108; [2004] 1 LNS 108; *PP v. Mohd Jon* [1992] CLJU 48; [1992] 1 LNS 48; *Teay Wah Cheong v. PP* [1963] CLJU 142; [1963] 1 LNS 142; [1964] MLJ 21; *Ruslee Baharum v. PP* [2009] CLJU 1520; [2009] 1 LNS 1520; *Md Zaki Fadzil Maon lwn. PP* [2010] CLJU 1883; [2010] 1 LNS 1883).

[36] In regards to cases cited by the counsel for the appellant such as *PP v. Syarikat Tekala Sdn Bhd* [2007] 6 CLJ 43; [2007] 6 MLJ 500; *Lim Guan Eng v. Ruslan Kassim & Another Appeal* [2021] 4 CLJ 155; [2021] 2 MLJ 514; *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; *Datin Seri Rosmah Mansor v. PP & Another Appeal* [2022] 4 CLJ 523; *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 217, the issues in those cases relate to the capacity or legality of the persons who conducted the prosecution and consequently the legality of the institution of the criminal proceedings and not as to the change of trial judge or Magistrate in the lower court. In many of these cases too, there were no discussions on the finality of a decision or order. These cases therefore have no relevance to the instant matter.

[37] In *Tennakoon D Harold v. PP* [1997] 1 CLJ Supp 392; [1997] 4 MLJ 497, the court in refusing to exercise its revisionary power stated:

> *Recently, in Mohamed Anuardin bin Abdul Salam & Anor v. PP [1996] 3 MLJ 298, Kang Hwee Gee J ruled that the sessions court judge's exercise of his discretion power under s. 261 of the CPC in ordering that the case against the appellants, which was partly heard by the previous sessions court judge, be continued by him from the point where it had been left off and not de novo was purely procedural and not appellable. His Lordship was further of the view that such an exercise of discretion, even if wrongful, could still be raised at the appeal of the case proper.*
>
> An attempt was made to convince me that I should exercise my revisionary powers to peruse the evidence and rule in favour of the present appellant. Reference was made to the case of *PP v. Sandra Margaret Birc*h [1977] 1 MLJ where Arulnandom J, upon reading a report in News Straits Times of Thursday, 19 August 1978 exercised his revisionary powers under s. 35 of the Courts of Judicature Act 1964 and called for the records of the case by reversing the lower court's decision. *Sandra Margaret Birch*'s case can readily be distinguished from the facts of the present case. There, the learned president of the sessions court wrongly held the view. (emphasis added)

[38] The definition given as to the phrase "ceases to exercise jurisdiction" is found in the judgment of Syed Agil Barakbah J (as he then was) in *PP v. Goh Chooi Guan* [1976] 2 MLJ 169. In that case, the sole question to be determined was whether upon the transfer of the President of the Sessions Court to the Royal Customs & Excise Department, Kuala Lumpur as Senior Federal Counsel resulted in him having ceased to exercise any jurisdiction in the trial part-heard by him. In discussing s. 261 of the CPC, the learned judge was of the view that a Magistrate ceases to exercise jurisdiction in a criminal case by his untimely death, retirement or resignation whereby the succeeding Magistrate will therefore have to act accordingly to the requirement of the section. According to the judge, in the case of Magistrate, the proviso of sub-s. (2) of s. 78 of the Subordinate Courts Act 1948 accords the Magistrate with jurisdiction to continue with such trial by virtue of his appointment duly gazetted in the former State. The learned judge stated further that this is in accord with the principle that having heard the witness they are the best persons to continue and complete the case in the interest of justice and with a view to ensuring a speedy trial. The learned judge went on to state that:

> *In the case of a transfer to the post of Senior Federal Counsel or Deputy Public Prosecutor, I do not consider the President or Magistrate ceases to have jurisdiction, being still gazetted as such.* He only ceases to officiate as a President or Magistrate. *There appears to be no legal objection under any written law for him to continue the part-heard case.* Nevertheless, a different question as regards public interest has to be considered in relation to the overriding principle that justice must not only be done but must manifestly and undoubtedly be seen to be done. *A man is disqualified from sitting in a judicial capacity on ground of bias in favour of one side of the other, or of prejudice against one side or of contravention of the rules of natural justice. There need not be actual bias or prejudice, but it is sufficient if in the eyes of right-minded persons there is such likelihood, in the circumstances, even though he is impartial as can be. It is not the mind of the President or the Magistrate that has to be looked into and whether he favours one side at the expense of the other, but rather the impression which would be given to the public at large* (per Lord Denning M.R. in *Metropolitan Properties Co Ltd v. Lannon* [1969] 1 QB 577 @ 599). In the case of a Deputy Public Prosecutor, whose duties are opposed to those of a President or a Magistrate and who has direct access to investigation papers of criminal cases, it is undesirable in the circumstances for him to sit on the Bench and continue the trial part-heard by him. The succeeding President or Magistrate will have to exercise his powers by invoking section 261.
>
> *The position of Senior Federal Counsel is, to my mind, slightly different, especially those who are attached to Federal Ministries and Departments. Their main duty is to give legal advice. Similarly, in the case of Encik Shaari. He is Legal Adviser to the Royal Customs & Excise and if there is any court work he has to perform occasionally, that will be confined to arguing criminal appeals in the High Courts in Customs and Excise cases. His position is unlike that of a Deputy Public Prosecutor in the States. There should therefore be no likelihood of offending the principles if he continues the part-heard case. Nevertheless, that ought to be rarely exercised and only in exceptional cases as the present case.*

> When I say the present case falls within the exceptional cases, I refer to the facts and surrounding circumstances and the probable effect caused by them. (emphasis added)

[39] The definition given by Syed Agil Barakbah in *Goh Chooi Guan* (*supra*) had been accepted by the Court of Appeal in the case of *Yap You Jee v. PP & Other Appeals* [2015] 7 CLJ 897. In *Yap You Jee* (*supra*), on the question whether a previous judge retained jurisdiction in the matter and can complete case that was partly heard, the Chief Justice, Tun Tengku Maimun Tuan Mat who was then the judge of the Court of Appeal speaking for the Court of Appeal had held as follows:

> [37] It was submitted by Mr Gobind that the transfer of a Sessions Judge from one state to another does not cause her to "cease jurisdiction in the matter", a pre-requisite which is mandatory for the operation of s. 261 of the CPC. In support thereof counsel relied on the decision of Syed Agil Barakbah in *Public Prosecutor v. Goh Chooi Guan* [1978] 2 MLJ 169.
>
> [38] *We agree with Syed Agil Barakbah J in Goh Chooi Guan, supra where he opined that a Magistrate ceases to have jurisdiction in a criminal case by his untimely death, retirement or resignation …* (emphasis added)

[40] On the other hand, Ajaib Singh J in the case of *Oh Keng Seng v. PP* [1975] CLJU 114; [1975] 1 LNS 114; [1976] 1 MLJ 143 was of the view that the transfer of the President of the Sessions Court as a Deputy Public Prosecutor has relinquished the power of the President of the Sessions Court and thereby ceased to exercise any jurisdiction in the trial of the applicant therein and ordered for the trial to be heard *de novo*.

[41] It is interesting to note that the situation that arose in the case of *Goh Chooi Guan* (*supra*) is similar to the instant matter. The learned M1 in the instant matter has been transferred as a Federal Counsel unlike in *Oh Keng Seng* (*supra*) where the President was transferred as a DPP.

[42] Further, the principle that can be gleaned in *Goh Chooi Guan* (*supra*) is that although there is no legal objection under any written law for a Magistrate to continue his part-heard case, the overriding principle is that justice must be done and the disqualification of Magistrate to continue his part-heard case will happen when there is likelihood of bias or that the accused has suffered prejudice in contravention of the rules of natural justice.

[43] Hashim Yeop A Sani J (as he then was) in *PP v. Kulasingam* [1974] CLJU 118; [1974] 1 LNS 118; [1974] 2 MLJ 26 took the view that because the officers (Magistrates, Sessions Court President, DPP and Federal Counsels) belong to the same parent service *ie*, the Judicial and Legal Service of the Federation, it would be perfectly proper for the President or Magistrate who has since been transferred to the Legal Department (or AGC) to complete any part-heard cases originally heard by him in the court where he was previously stationed. Again, the learned judge qualified his view by

stating that this must be subject to an overriding condition that there must not be any possible miscarriage of justice or any contravention of rules of natural justice. In this case, the example given is where the President of the Sessions Court has been appointed to be a DPP in the same state because of the mere fact that by virtue of his office he has access to investigation papers relating to the case.

[44] In *Maleb Su* (*supra*), Hashim Yeop A Sani FJ dealt with the same subject matter under s. 261 of the CPC and in the application before the learned judge the reason given by the counsel for the appellant was that "there shall not be any semblance of bias". What was asked was that there must appear to be impartial adjudication and the circumstances did not permit that. The learned judge in addressing the issue on bias viewed as follows:

> *A person who has a judicial duty to perform should disqualify himself from performing it if he has a pecuniary interest in the decision or if he has a bias which renders him incapable of being an impartial judge.* This principle was stated by Bowen L.J. in his judgment in *Leeson v. General Council of Medical Education and Registration* (1889) 43 Ch D 366 384-385. In the same case Fry LJ took a stricter view at page 390 as follows:
>
> *I think that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual bias or prejudice of the judges, but that they shall be free from the suspicion of bias or prejudice.*
>
> In a situation where a likelihood of bias is alleged Lord Widgery L.J. in *Regina v. Altrincham Justices* (*supra*) said:
>
> *It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment …*
>
> *I think the correct view is also clearly stated in Healey v. Rauhina & Anor [1958] NZLR 945 following R v. Camborne Justices, Exparte Pearce [1955] 1 QB 41 in that if bias is alleged (other than pecuniary or proprietary bias) then there must be proved areal likelihood of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficent. A fortiori bare allegations before hearing had hardly commenced.*
>
> *Finally, what is the "system" which counsel said they fear would produce a likelihood of bias? The judicial and legal service is one of the public services mentioned in Article 132(1) of the Federal Constitution. The authority which exercises jurisdiction over the officers of the service in matters of promotions and discipline is the Judicial and Legal Service Commission established under Article 138 of the Constitution of which the Attorney-General is only a member. There is nothing in law to say that the Attorney-General is head of the service; in fact he cannot be by virtue of Article 138 of the Constitution. An officer belongs to the judicial and legal service but he may serve in various different capacities in the Judicial Department and Legal Department. As normal in the administrative set-up of the public service each department has its own head. And the Attorney-General is not the head of the Judicial Department. Thus looking at the legal and administrative framework*

governing the service I do not think the facts here warrant a conclusion of a real likelihood of bias. If such a conclusion is made it is not the sort of conclusion which in my opinion right thinking persons armed with the proper information and advice would entertain.

Based on the foregoing I do not think I should interfere with the orders made in the lower Courts in Criminal Appeals Nos. 2 and 8 of 1984. Legal bias has not been satisfactorily shown in both cases. (emphasis added)

[45] Further in the case of *Teay Wah Cheong v. PP* [1963] CLJU 142; [1963] 1 LNS 142; [1964] MLJ 21, Hashim J stated that unless it would cause hardship and great inconvenience to the accused person and witnesses, the case is better heard *de novo* by the new President or Magistrate. In that case, the conviction was set aside because the succeeding President of the Sessions Court had misdirected himself as to the evidence wherein he found that there was only one eyewitness whilst the former President had noted down that there were two other eyewitnesses. This is where the learned judge commented of the danger of acting under s. 261 of the CPC. It must be noted that in that case, the error was identified at the close of the case. In the present matter, the "danger" as found by the learned judge in *Teay Wah Cheong* (*supra*) has not occasioned.

[46] Premised and guided by the principles enunciated by the authorities stated in the above, there is nothing before this court or the Magistrates' Court for that matter that shows how the appellant herein can be said to be prejudiced or had been prejudiced in the sense that there is a likelihood of bias on the part of the learned M1 having been transferred as Federal Counsel at the MECD who continued to hear his part-heard case with just two more witnesses where their examination-in-chief had completed before his transfer.

[47] In *PP lwn. Anthony Rayapan & Satu Lagi* [2010] 10 CLJ 428; [2010] 9 MLJ 774, an application was made under s. 323 of the CPC by the Director of the Johor Bahru Courts to the High Court for revision of the Magistrate who had recused herself from continuing hearing his part-heard for an offence under the Customs Act 1967 based on the letter of the accused's counsel that both accused believed that they will not be fairly tried if they were to give evidence on oath. The High Court through the judgment of Kamardin Hashim JC (as he then was) stated the followings:

[12] Seksyen 261 KPJ mengandungi peruntukan khas bagi keadaan di mana seseorang majistret yang sedang membicarakan sesuatu kes terhenti daripada menjadi seorang majistret atau telah bertukar ke daerah lain.

Peruntukan tersebut menyatakan majistret berkenaan telah 'ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercise such jurisdiction'. Situasi ini tidak berlaku dalam kes di hadapan mahkamah oleh kerana Puan Majistret yang berkenaan masih berada dalam bidang kuasa dan masih mempunyai bidang kuasa untuk

meneruskan dengan pendengaran kes terhadap tertuduh-tertuduh di sini. Seksyen 261 KPJ mengandungi peruntukan khas bagi keadaan di mana seseorang majistret yang sedang membicarakan sesuatu kes terhenti daripada menjadi seorang majistret atau telah bertukar ke daerah lain.

[13] *Tindakan Puan Majistret menarik diri dalam kes ini hanyalah berdasarkan kepada surat peguambela terdahulu bagi tertuduh-tertuduh yang bertarikh pada 29 September 2009 yang menyuarakan perasaan anak guam mereka yang berasa takut Puan Majistret tidak akan dapat berlaku adil kepada mereka sekiranya keterangan membela diri mereka didengar di hadapan Puan Majistret yang sama. Kemungkinannya Puan Majistret berpegang kepada prinsip asas undang-undang bahawa 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. Adalah tidak disangkal bahawa mahkamah hendaknya sepanjang masa memelihara keyakinan masyarakat terhadap institusi kehakiman sebagai satu-satunya tempat masyarakat untuk menuntut keadilan dan memesongkan pandangan umum dari tuduhan bahawa seseorang majistret atau hakim itu bersifat berat sebelah.* Perkara ini telah ditekankan oleh Barwick CJ dalam kes *R v. Watson; Ex parte Armstrong* (1976) 136 CLR 248 di ms 262-263 seperti berikut:

His (*ie*, Lord Hewart's) statement of principle, which was recently reaffirmed in this court in *Stollery v. Greyhound Racing Control Board* does go to the heart of the matter. It is so fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision. To repeat the words of Lord Denning MR which have already been cited, 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

[14] Puan Majistret tidak menghiraukan surat peguambela tertuduh yang memohon maaf dan menarik balik permohonan mereka untuk Puan Majistret supaya menarik diri. Sebaliknya, berpandukan kepada surat peguambela yang awal bertarikh pada 29 September 2009, Puan Majistret telah menarik diri daripada terus mendengar perbicaraan kes terhadap tertuduh-tertuduh di sini. *Alasan permohonan peguambela supaya Puan Majistret menarik diri adalah sangat remeh iaitu tertuduh-tertuduh takut Puan Majistret tidak dapat berlaku adil terhadap tertuduhtertuduh semasa mereka memberikan keterangan untuk membela diri. Ujian yang terpakai bagi menentukan sama ada seseorang hakim perlu menarik diri telah dijelaskan oleh Hashim Yeop Sani FJ (ketika itu) dalam kes Maleb bin Su v. Public Prosecutor [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232; [1984] 1 MLJ 311, seperti berikut:*

I think the correct view also clearly stated in Healey v. Rauhina & Anor [1958] NZLR 945, following R v. Camborne Justices, Exparte Pearce [1955] 1 QB 41 in that if bias is alleged (other than pecuniary or proprietory bias) then there must be proved a real likelihood of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficient.

[15] Ujian yang sama juga telah dipakai dan disahkan kemudiannya oleh Yang Amat Arif Salleh Abas LP dalam kes *Cheak Yoke Thong v. Public Prosecutor* [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87; [1984] 1 MLJ 311 di mana YAA tersebut telah memutuskan seperti berikut:

From the above question, two issues are raised. Firstly, whether Cheak's fear of the possibility of the magistrate being biased, whether the fear be justified or not, is a sufficient reason for the magistrate to disqualify himself from hearing the case … As to the first issue, surely no one could come to court and seek for the dismissal of the case against him or for a trial by another tribunal just because he said that the adjudicating officer would be biased against him. On this ground alone the application should be turned down. His fear alone is not sufficient. He must, however, show by evidence that the adjudicating officer or the tribunal is in fact biased or is likely to be so. Hashim Yeop A Sani FJ has examined this question and we see no reason to differ from his view.

[16] *Berbalik kepada kes sekarang, peguambela membuat alegasi kosong dengan mengatakan tertuduh-tertuduh takut (fear) bahawa Puan Majistret tidak akan dapat berlaku adil terhadap mereka. Ketakutan (fear) sahaja adalah tidak mencukupi untuk Puan Majistret menarik diri. Mengikut ujian yang dinyatakan di atas, apa yang perlu ada adalah keadaan di mana wujudnya 'real likelihood of bias' di pihak Puan Majistret. Untuk itu maka perlulah ada bukti dan keterangan yang menunjukkan telah atau akan berlakunya keputusan berat sebelah oleh Puan Majistret dalam kes ini. Surat peguambela langsung tidak memberikan apa-apa butiran ataupun landasan bagi ketakutan tertuduh-tertuduh di sini.* Deane J dalam kes *Webb and Hay v. The Queen* (1994) 181 CLR 41 telah memberikan *empat kategori dalam keadaan mana berat sebelah (bias) boleh berlaku iaitu seseorang hakim bicara itu sama ada (i) Mempunyai kepentingan sama ada secara langsung atau tidak langsung, kepentingan kewangan atau sebaliknya dalam mana-mana satu pihak yang bertelagah seperti memiliki saham dalam syarikat terbabit; (ii) Bersekutu dengan mana-mana pihak yang bertelagah; (iii) Mempunyai pengetahuan yang berkenaan dengan kes tersebut sebelum perbicaraan dimulakan seperti telah mendengar kes melibatkan pihak-pihak yang sama sebelum itu yang melibatkan pertikaian yang serupa; dan (iv) Perlakuan hakim bicara sama ada semasa pendengaran kes yang berkenaan atau perlakuan di luar prosiding yang yang menunjukkan perlakuan berat sebelah ataupun sekurang-kurangnya dibimbangi hakim bicara tersebut akan bertindak berat sebelah. Dalam kes di hadapan mahkamah sekarang tidak ada secebis keterangan pun dikemukakan sama ada di hadapan Puan Majistret atau kepada mahkamah ini apakah asas kepada ketakutan tertuduh-tertuduh bahawa Puan Majistret tidak akan berlaku adil kepada mereka. Tidak dikatakan Puan Majistret ada kepentingan atau bersekongkol dengan pihak pendakwaan atau mempunyai pengetahuan berkaitan kes ini terlebih dahulu ataupun kelakuan Puan Majistret dalam mengendalikan perbicaraan kes mereka yang menjadi asas kenapa mereka memohon Puan Majistret manarik diri kerana takut berlaku 'bias'.*

[17] Dalam kes ini ketakutan tertuduh bahawa Puan Majistret tidak akan berlaku adil kepada mereka adalah tidak berasas sama sekali. *Sistem kehakiman di tanah air kita yang memastikan ada tiga peringkat yang memutuskan secara muktamad sesuatu kes jenayah dan undang-undang dan prosedur yang diamalkan dapat memastikan ketakutan tertuduh-tertuduh terhadap Puan Majistret tidak berlaku adil kepada mereka dapat dihindarkan dan hak tertuduhtertuduh dipulihkan. Seperti kata YAA Salleh Abas LP dalam kes Cheak Yoke Thong seperti berikut:*

In our system not only is there room to doubt the existence of legal bias, but also our law of procedure and evidence meets the required standard designed to ensure fair and impartial trial and to prevent miscarriage of justice. We, therefore, see no substance in this application.

[18] Begitu juga dengan adanya system kehakiman tiga peringkat dapat memastikan apa-apa kesilapan dan ketidakadilan dapat dipulihkan. Keputusan Puan Majistret boleh dirayu ke Mahkamah Tinggi dan ke Mahkamah Rayuan. YA Hakim Abdul Wahab Patail dalam kes Public Prosecutor v. Mohamed Ezam bin Mohd Nor [2001] 3 MLJ 34; [2001] 8 CLJ 558 telah memberikan pandangan berikut, katanya:

That justice is done is as well guaranteed as can be by the fact that decisions of a judge of the High Court may be appealed to the Court of Appeal and the Federal Court, comprised of three judges sitting together, and in the latter court, by more than three judges as occasion may require. Indeed it would be apparent that there is adequate provision to ensure that any error or injustice that is occasioned by actual bias or pre-judgment could be remedied.

[19] Dalam kes *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 MLJ 213; [1995] 2 CLJ 900 Mahkamah Rayuan menyarankan agar tohmahan berat sebelah terhadap hakim bicara dan mahkamah yang tidak berasas hendaklah dihentikan, jika tidak tindakan keras kerana menghina mahkamah hendaklah diambil terhadap mereka yang membuat tohmahan yang tidak berasas tersebut:

In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

[20] Atas alasan-alasan yang tertera di atas, saya mendapati keputusan Puan Majistret menarik diri dalam perbicaraan seterusnya kes ini dibuat tidak berlandas kepada lunas undang-undang yang mantap. Oleh itu keputusan beliau menarik diri pada peringkat kes pembelaan adalah tidak wajar dan tidak boleh dipertahankan. Seseorang majistret tidak sewajarnya menarik diri dalam keadaan kes ini lebih-lebih lagi hanya berpandukan kepada tohmahan yang tidak berasas dan tidak bijak yang dilakukan oleh tertuduh-tertuduh dalam kes ini. Puan Majistret telah mengenepikan tanggungjawab beliau untuk memastikan perbicaraan kes ini diselesaikan dengan bijaksana. Memetik kata-kata YA Abdul Wahab Patail dalam kes *Mohd Ezam Mohd Nor*, kata beliau:

A judge has very clear responsibilities. It would be irresponsible to discharge himself on frivolous grounds, since he would be shirking his duties, and transferring his burden upon other judges. Furthermore, disqualifications if lightly taken, facilitate picking and choosing of judges to hear cases.

Isu mengenai (b)

[21] Seksyen 261 KPJ menyatakan bahawa majistret yang mengambilalih pendengaran perbicaraan boleh menggunapakai keterangan yang telah direkodkan oleh majistret terdahulu dan sebahagian keterangan yang direkodkan oleh beliau sendiri serta majistret baru boleh jika mahu memanggil semula mana-mana saksi yang telahpun memberi keterangan sebelum itu. Proviso (a) seksyen itu pula memperuntukkan bahawa tertuduh juga boleh meminta supaya mana-mana saksi pendakwaan dipanggil semula sebelum majistret yang mengambil alih menyambung bicara kes berkenaan. Proviso (b) pula memberikan kuasa kepada Mahkamah Tinggi atas rayuan untuk membatalkan sabitan dan memerintahkan perbicaraan semula sekiranya berpendapat bahawa tertuduh telah diprejudiskan. (emphasis added)

[48] Returning to the present matter and based on the authorities in the above, this court reiterates that there is nothing before this court and the appellant fails to show how she is being prejudiced in that there is likelihood of bias and that there is miscarriage of justice that has occasioned by the fact that the learned M1 had continued with the trial until the close of the prosecution's case.

[49] This court is further compounded by the fact that throughout the trial the appellant being represented by a very abled counsel had never raised any objection or made any application for the recusal of the learned M1. In fact, upon the return of the learned M1 to continue hearing the trial after he was transferred, the counsel for the appellant made application to impeach two prosecution witnesses to which the application was heard and the learned M1 had made the ruling accordingly.

[50] It is apparent that the present application only arose when the appellant had appointed a new set of solicitors to represent her. Change of solicitor can always happen but the principle of law remains the same and one of the principles is that any objection must be raised at the time when the situation arose otherwise it can be inferred that it is an afterthought. The appellant cannot be said to have not known that the learned M1 was transferred. No averment was made by the appellant that she did not know that the first Magistrate was transferred or that she was not informed by her former solicitor in her affidavit. Instead, this court finds that the appellant must have known the transfer of the learned M1 because in a letter of the complainant's solicitor, Messrs Gani Patail Chambers requesting for the learned M1 to continue with the trial, the said letter dated 14 January 2021 was copied to the solicitor representing the appellant at that material time and yet no objection was taken up by the appellant. Instead, the proceeding continued before the learned M1 until the close of the prosecution's case.

[51] There is nothing in law or rules that states a Magistrate must declare his transfer to the parties in litigation before him. By virtue of s. 114(e) of the Evidence Act 1950, upon returning to continue with his part-heard it can be presumed that the judicial and official acts of the learned M1 have been regularly performed including obtaining the mandate/directive from the Chief Registrar's office for him to continue with his part-heard until the close of the prosecution's case. This is part and parcel of the administration in the judiciary. In *Yap You Jee* (*supra*), the Court of Appeal stated:

> However, we do not agree that the 'directive' given to the succeeding sessions court judge amounts to a breach of the provisions of s. 261. It has been a practice for the Chief Judge or the Chief Registrar to decide on whether the partheard cases would be completed either by the previous presiding magistrate or sessions court judge or by his successor and this decision or directive' which was given administratively could not and did not in any way fetter the discretion of the succeeding magistrate or sessions court judge provided for under s. 261 of the CPC. The duty remains on the magistrate or the sessions court judge to act under the provisions of s. 261 of the CPC".

[52] There is nothing in law to state that a letter or email such as the one from Tuan Azhanis Teh informing of the new Magistrate taking over the trial at the defence stage tantamount to an affirmation that the trial before the learned M1 when he was already transferred as FC to be a nullity or that the learned M1 has ceased jurisdiction. Nothing more can be inferred than what was stated in the said letter/email which merely states that the new Magistrate in the form of the learned M2 would take over the trial at the defence stage.

Conclusion

[53] Premised on the reasons alluded to, the appellant's appeal was dismissed.